

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 15 of 2008

BROOKSIDE DAIRY LIMITED.....PLAINTIFF

- VERSUS -

TESCO CORPORATION LIMITED..... DEFENDANT

R U L I N G

Before me is an application by the defendant purportedly made under the provisions of **Order IXA Rule 10** and **Order XXI Rule 22** of the **Civil Procedure Rules** seeking the following orders of the court: The defendant seeks to set aside the ex-parte judgment entered in favour of the plaintiff for the sum of KShs.3,656,263.65 plus costs and interest. In the alternative, the defendant sought an order of this court to vary the said judgment entered in favour of the plaintiff for the sum of KShs.3,448,830.13 instead of KShs.3,656,263/50. Pending the hearing of the application, the defendant applied to stay of execution of the decree herein. The grounds in support of the application are stated on the face of the application. The defendant stated that it had paid in full the sum that it owed the plaintiff (*i.e. KShs.3,448,830.13*) and was not therefore indebted to the plaintiff for any other amount whatsoever.. The defendant contends that the plaintiff prematurely filed suit against it without any legitimate cause of action. The defendant was of the view that the plaintiff's act of prematurely filing suit against it was actuated by bad faith and was untenable in law. The defendant urged the court to set aside the ex-parte judgment which in its view, was irregularly entered, *ex debito justitiae*. The application is supported by the annexed affidavit of Muktar Parker.

The application is opposed. Peter Kuria, the credit manager of the plaintiff company swore a replying affidavit in opposition to the application. In the said affidavit, he deponed that the defendant was indebted to the plaintiff in the sum pleaded in the plaint. He annexed to his affidavit statements which indicated that indeed the defendant owed the amount pleaded in the plaint. He deponed that the defendant maintained a credit account with the plaintiff. The said credit account was required to be settled within thirty (30) days of the invoicing of the goods supplied. He deponed that the defendant did not raise any query regarding the statement of accounts upon the same being availed to it. He swore that the three (3) post dated cheques which the defendant issued to the plaintiff, were on 17th January 2008, banked and on 21st January 2008 returned unpaid for the reasons that there were no funds in the defendant's accounts. He deponed that the plaintiff filed suit and on 7th February 2008, served the summons to enter appearance upon the defendant. He swore that the judgment which was entered against the defendant was regular. He conceded that when the plaintiff sought to execute against the defendant by summoning its directors to show cause in court, the defendant instructed the plaintiff to re-bank the dishonoured cheques. The said cheques were duly paid on 28th May 2008. He urged the court to disallow the application and order the defendant to pay the balance of the principal sum, costs and interest.

At the hearing of the application, I heard the rival arguments made by Mr. Odera for the defendant and by Mr. Kabaiku for the plaintiff. The said counsel, more or less, reiterated the contents of the application and the affidavits filed in support of their respective opposing positions. The principles to be considered when this court determines whether or not to set aside an exparte judgment are well settled. Where it is established that there was no proper service, such judgment is irregular. The court has no discretion in the matter and will set aside the exparte judgment *ex debito justitiae (as of right)*. (See **Patel -vs- EA Cargo Handling Services Ltd [1974] EA 75**). Where it is proved that the defendant was served, the court has unfettered discretion to set aside ex-parte judgment obtained in default of appearance, provided that in

so doing, no injustice in occasion to the opposing party. The court has taken into account the circumstances that caused the delay in entering appearance and further whether the defendant has a good defence on merits (see *Mbogo –vs – Shah [1968] EA 93*). The exercise of discretion by the court is intended to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise to obstruct or delay the course of justice.

In the present application, the defendant is not saying that he was not served; far from it. The thrust of the defendant's application is that the suit was prematurely filed, since, at the time the suit was filed, the defendant had issued postdated cheques to the plaintiff in full and final settlement of the debt owed. According to the defendant, in November 2007, it issued three post dated cheques to the plaintiff for the total sum of KShs.3,448,830.13. The said cheques were payable on 15th January 2008. It was not disputed that the said cheques were presented by the plaintiff to the defendant's bank for payment on 17th January 2008. It was further not disputed that the said cheques were returned unpaid to the plaintiff on 21st January 2008. Meanwhile, on 16th January 2008, the plaintiff filed the present suit against the defendant.

According to Faustus Alunga, the process server, Mr. Muktar Parker, a director of the defendant was served (*on behalf of the defendant*) with summons to enter appearance on 7th February 2008 at the 1st floor of Jamia Plaza. The said director of the defendant was pointed out to the process server by Mr. Peter Kuria, the credit manager of the plaintiff. Mr. Muktar Parker accepted service on behalf of the defendant but decline to endorse his signature on the back of a copy of the summons. As stated earlier, the defendant does not deny that it was served. The affidavit sworn by Mr. Muktar Parker does not explicitly deny that the defendant was duly served. I have evaluated the facts in regard to whether the defendant was served. It is evident that the defendant was duly served. The defendant did not dispute the facts deponed by the process server in the affidavit of service which was to the effect that he had served the defendant. I hold that the defendant was properly served and therefore the judgment entered in default of appearance was regular.

This court may still set aside the *exparte* judgment if it is of the opinion that the interest of justice would be served and further if it is of the view that the defendant has a good defence on merits that raises triable issues. In the affidavit in support of its application, the defendant did not annex a copy of the draft statement of defence. It is therefore impossible for this court to determine whether the defendant will have a good defence on merits. This court assumed that the defendant did not wish to file a defence on to the plaintiff's claim. This court assumed that the defendant did not wish to file a defence in the event that the *ex-parte* judgment is set aside.

Did the plaintiff prematurely file suit as alleged by the defendant? As stated earlier, it was not disputed that the plaintiff filed suit on 16th January 2008 before the post dated cheques were presented to the bank for payment on 17th January 2008. If the said cheques were duly paid, this court would not have hesitated to hold that the suit was prematurely filed. However, since the said cheques were returned unpaid on 21st January 2008, it is not open for the defendant to claim that the suit was prematurely filed. It was evident that the defendant's assertion that it stopped the payment of the cheques on the account that the plaintiff had filed suit against it is untrue. The defendant did not become aware of the suit until 7th February 2008 when its director was served with summons to enter appearance. The defendant cannot impeach the plaintiff's suit on the ground that it was prematurely filed when clearly the defendant issued cheques to the plaintiff in the knowledge that the same would be unpaid since the defendant had deposited no funds in the said account to enable the said cheques to be honoured. I find no merit with the defendant's argument that the suit herein was prematurely filed.

As regard whether the defendant should pay the plaintiff the sum of KShs.3,448,830.13 or KShs.3,656,265/50 in full and final settlement of the claim, it was clear from the statements annexed to the replying affidavit of Peter Kuria that the defendant owed the plaintiff the sum of KShs.3,656,265/50. The defendant did not place before the court any evidence to support its assertion that the sum owed to

the plaintiff was the lesser figure of KShs.3,448,830/50. The plaintiff supplied sufficient proof that it was indeed owed the said sum of KShs.3,656,263.65. The plaintiff conceded that the defendant had already settled the sum of KShs.3,448,830.13. The plaintiff is therefore entitled to be paid the difference of KShs.207,433.50. The defendant did not annex a draft statement of defence in the affidavit sworn in support of its application. It is clear that the defendant did not intend to oppose the plaintiff's claim. Since the defendant made part payment of the principal sum after the suit was filed (*i.e. on 28th May 2008*), the plaintiff is entitled to the costs of the suit.

The upshot of the above reasons is that the application filed by the defendant dated 9th September 2008 seeking the setting aside of the ex-parte judgment is unmeritorious. The judgment entered against the defendant was regular. I decline to set it aside. The defendant's application is dismissed with costs to the plaintiff.

DATED at NAIROBI this 8th day of OCTOBER, 2008.

L. KIMARU

JUDGE